84-240

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NANCY FREEDMAN, et al.,

Petitioners,

vs

TRANS WORLD AIRLINES, INC., and
AIR LINE STEWARDS & STEWARDESSES
ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When, following the signing of a settlement agreement between an employer and a class of discharged employees, liability is adjudicated at the behest of the intervening union in favor of the former employees, does this Court's decision in *Firefighters Local Union 1784* v. *Stotts,* 104 S.Ct. 2576 (1984) require that the standards of Title VII, rather than the provisions of the settlement agreement, govern a district court's power to modify its award of retroactive seniority?

2. May a district court modify the provisions of a decree when circumstances obtaining at the time of its issuance have changed absent the "clear showing of grievous wrong evoked by new and unforseen conditions" of *United States* v. *Swift & Co.,* 286 U.S. 106 (1932)?

3. Must a claim form, furinshed to class members pursuant to Rule 23(d)(2) of the Federal Rules of Civil Procedure, meet the standards of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950)?

4. May a district court, prior to approval of a proposed settlement, and in advance of a determination of the precise relief available, require class members to opt into a Rule 23(b)(2) class action?

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ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 27, 1984.

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[1] Petitioners are Nancy Freedman, Deanne Avant, Suzanne Baar, Terri Bacchi, Sydney Cain, Chris Carlson, Julie K. Cuomo, Rita K. Davis, Roberta Enright, Janet Filip, Mary Ellen Giles, Regina Goldwag, Lydia Gourvitz, Janice Graham, Edith Halpern, Marianne Hatches, Betty Heisler, Sally Holbrook, Carol Marie Holmes, Sally Ingmanson, Carma Rae Johnson, Pamela Kapaun, Lorna Leonard, Joanne Martinez, Elizabeth McNamara, Barbara Porter, Theresa Poulton, Debby L. Riley, Sandra Roth, Patricia Rudner, Mary Ann Ryan, Lillian Smyth, Beverly Sorenson, Charlotte E. Tiesman, Judy Ann Turpin, Sarah L. Vigil, Priscilla Ann Voight, Patricia A. West, who appear individually and on behalf of similarly situated class members.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 730 F.2d 509. The decision of the district court (App. 20a-31a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on March 27, 1984 (App. 16a-17a); a timely petition for rehearing was denied on May 9, 1984. (App. 18a-19a.)

STATUTES AND RULES INVOLVED

1. This case involves Section 706(g) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(g), which provides:

> If the court finds that the respondent has intentionally engaged or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title.

2. This case also involves Rules 23(d)(2) and 23(e) of the Federal Rules of Civil Procedure:

> (d) Orders in conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . .
>
> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT

This case was brought under Title VII of the civil rights Act of 1964, 42 U.S.C. § 2000e et seq., to seek a remedy for the class of female flight attendants who had been aggrieved by TWA's "no motherhood" policy.[2] In 1976, the district court

[2] "Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated 'pursers' by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants." *In re Consolidated Pretrial Proceedings,* 582 F.2d 1142, 1144 (7th Cir. 1978).

concluded that TWA's policy had constituted unlawful discrimination on the basis of sex. The court of appeals affirmed the finding of liability, *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142, 1145-47 (7th Cir. 1978), but concluded that the claims of approximately 92% of the class were barred because they had failed to file timely charges with the EEOC. Id. at 1147-52. Certiorari was sought by plaintiffs, No. 78-1545, and by TWA, No. 78-1549. This Court deferred consideration of the petitions while the parties negotiated a settlement, 442 U.S. 916 (1979).

The settlement agreement provided, *inter alia,* that class members returning to work would receive full competitive seniority for the "compensation period"[3] unless there was a "timely objection of any interested person," in which case the "total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA." (App. 5a.)

The flight attendant union (IFFA) intervened to object to the award of full seniority. After an evidentiary hearing, at which the district court relied upon estimates of the number of class members who would return to work,[4] the trial court found

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[3] The "compensation period" was defined in the agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which the Settlement Agreement is signed by TWA . . ." TWA signed the agreement on June 18, 1979. (App. 5a n.4.)

[4] Along with notice of the settlement (App. 32a-38a), class members received a claim form, which included the question "Do you desire re-employment as a TWA Hostess?" The settlement notice was silent about the significance of responses to this question, which were used to estimate the number of class members who would return to work. 630 F.2d at 1166.

"that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases." (App. 5a.)

On the IFFA's appeal, the Seventh Circuit upheld the settlement agreement and affirmed the district court's finding of no "unusual adverse impact." *Air Line Stewards and Stewardesses Assn.* v. *Trans World Airlines,* 630 F.2d 1164, 1169 (7th Cir. 1980).

This Court granted IFFA's petition for writ of certiorari, 450 U.S. 979 (1981) to consider whether retroactive seniority could be granted without a finding of discrimination. The Court also granted the cross petitions which had been filed by the plaintiff class and TWA from the Seventh Circuit's 1978 decision.[5] 450 U.S. 979 (1981).

In its decision on the merits, the Court reversed the Seventh Circuit's 1978 ruling that the claims of 92% of the class were time barred. *Zipes* v. *Trans World Airlines, Inc.,* 455 U.S. 385 (1982). The Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393 (footnote omitted).

The Court then turned to the union's challenge to the award of retroactive seniority. 455 U.S. at 398-401. The Court viewed the seniority order as having left "to the District Court the final decision as to retroactivity," and concluded that "[t]he award of retroactive seniority . . . is not infirm for want of a finding of a discriminatory employment policy." 455 U.S. at 399.

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[5] The Court subsequently limited the grant of the writ to exclude review of IFFA's question three, whether reinstatement with full competitive seniority would have an "unusual adverse impact." 451 U.S. 980 (1981).

TWA's petition was dismissed as improvidently granted in the Court's decision on the merits. 455 U.S. at 392 n.5 (1982).

Following the decision of this Court, the class asked the district court to modify the decree in two respects. First, class members who were returning to work requested the district court to "award retroactive competitive-status seniority under the standards of *Franks* v. *Bowman,*" 455 U.S. at 492 (Powell, J., concurring), i.e., to order that they be credited with competitive seniority to the date of reinstatement in 1983, rather than to the date of the signing of the settlement decree in 1979, as had previously been ordered. In addition, fourteen class members who in 1979 had not expressed an interest in reinstatement sought to change their election and return to work.[6]

The district court refused to grant seniority to the date of reinstatement on the ground that "there has been no finding that TWA has violated the Civil Rights Act." (App. 29a.) The district court also refused to allow class members who had not opted for re-employment to change their election, concluding that the settlement agreement "require[d] class members to indicate in writing their preference for employment prior to December 2, 1979." (App. 25a.)

The Seventh Circuit affirmed both rulings, although on different grounds. (App. 1a-15a.) The court of appeals appeared to agree with petitioners that there had been a finding of discrimination against TWA (App. 5a), but concluded that the case did not satisfy the standards of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) for modification of a decree. (App.

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[6] In the nearly four years which elapsed before any class member was reinstated, approximately 36 women changed their mind—22 who had initially sought reinstatement no longer wished to return to work, and 14 women who had initially answered "no" on the claim form, see note 4 *supra*, expressed a desire to return to work.

TWA permitted class members to change their election from reinstatement and obtain the "trip passes" provided for in the decree. TWA maintained, however, that an original indication of a desire not to return to work was irrevocable.

9a.) Nor did the court of appeals agree that modification of the decree was required by Title VII; in the view of the Seventh Circuit, "[t]he grant of additional back seniority ... will primarily harm the incumbent employees ... [and is not] necessary to further the goal of righting the wrong for which TWA is presumably responsible." (App. 10a n.9) As to the decision of the district court to refuse to permit class members to change their election and return to work, the Seventh Circuit rejected the district court's construction of the settlement agreement[7] (App. 25a), holding that "[t]he Settlement Agreement, however, does not state explicitly anywhere that there is a time limit on or before which a class member must indicate her desire to be reemployed." (App. 13a.) Nonetheless, the court of appeals held the settlement agreement required that class members "desiring reinstatement ... complete the form in a manner reflecting that desire." (App. 14a.)

In a timely petition for rehearing, petitioners argued that the Seventh Circuit's concern with "harm to incumbent employees" (App. 10a n.9) was contrary to the decision of this court in *Franks* v. *Bowman,* 424 U.S. 747 (1976) when, as here, there had been a final adjudication that full restoration of retroactive seniority would not have an unusual adverse impact. Petitioners also argued that the court's construction of the "claim form" as a mandatory opt-in requirement was in conflict, *inter alia,* with its decision in *Romasanta* v. *United Air Lines, Inc.,* 717 F.2d 1140 (7th Cir. 1983) that prior to a resolution of seniority issues, "it would be impossible to determine which potential class members 'really' want to return to their positions ... and which 'really' seek only a financial remedy." Id. at 1147. Rehearing was denied without opinion. (App. 18a-19a.)

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[7] The district court had construed the decree as "requir[ing] class members to indicate in writing their preference for reemployment prior to December 2, 1979." (App. 25a.)

REASONS FOR GRANTING THE PETITION

I. Conflict with *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984)

The decision of the court of appeals in this case is squarely at odds with this Court's intervening decision in *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984) and presents issues of substantial significance to the remedies available in Title VII cases.

In *Stotts*, the Court held that a district court's power to modify an award of retroactive seniority in a Title VII case is to be measured by the standards of the statute, rather than by the provisions of a decree. 104 S.Ct. at 2587 n.9. The decision of the court of appeals in this case is flatly to the contrary.

This Court, in its first decision in this case, held that petitioners are the victims of unlawful discrimination. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Under Title VII standards, petitioners would be entitled to reinstatement with full retroactive seniority, upon the district court's finding, approved by the court of appeals, 630 F.2d 1164, 1169 (7th Cir. 1980) that full restoration of retroactive seniority would not have an unusual adverse impact. *Franks* v. *Bowman*, 424 U.S. 747, 777 (1976). This remedy, however, has been withheld.

Prior to the Court's first decision in this case, the district court had approved a settlement agreement and, pursuant to that agreement, granted petitioners retroactive seniority to June 18, 1979. Petitioners began to return to work in 1983, after this Court had reversed the 1978 decision of the court of appeals and reinstated the district court's decision granting summary judgment to the plaintiff class. It was at that time—after there had been a final determination of the liability issues in their favor—that petitioners sought a modification of the decree to secure full retroactive seniority.

The district court and the court of appeals refused to apply Title VII standards to petitioners' request for full retroactive seniority. In the view of the courts below, the grant of seniority was governed by the provisions of the settlement agreement (App. 29a), which could only be modified under the standards of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), i.e., upon "a clear showing of grievous wrong evoked by new and unforseen conditions."[8] *Id.* at 119. (App. 6a.)

The refusal of the Seventh Circuit to apply Title VII standards to petitioners' request for full retroactive seniority is manifest in its holding that "[t]he grant of additional back seniority . . . will primarily harm the incumbent employees . . . [and is not] necessary to further the goal of righting the wrong for which TWA is presumably responsible." (App. 10a n.9.) This reasoning was rejected by the Court as "untenable" in *Franks* v. *Bowman*, 424 U.S. 747, 775 (1976) and has no place in Title VII litigation: "If relief under Title VII can be denied merely because the majority group of employees, who had not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." 424 U.S. at 775, quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 663. As the Seventh Circuit itself observed in *Romasanta* v. *United Air Lines, Inc.*, 717 F.2d 1140

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[8] When the settlement was approved in 1979, petitioners expected to return to work "in less than half a year." *Air Line Stewards* v. *Trans World Airlines*, 630 F.2d 1164, 1169 (7th Cir. 1980). Nearly four years elapsed, however, before class members returned to work.

The conclusion of the Seventh Circuit to rely upon *Swift* to hold that the three year delay is insufficient to justify a modification of a decree (App. 11a) is seemingly at odds with the standards enunciated in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961) and applied in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976). See *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576, 2604-05 (1984) (Blackmun, J., dissenting); *New York State Association for Retarded Children* v. *Carey*, 706 F.2d 956, 968-71 (2d Cir. 1983); *SEC* v. *Warren*, 583 F.2d 115, 118-20 (3d Cir. 1978).

(7th Cir. 1983), Title VII requires "the maximum measure [of seniority relief] that would not result in 'unusual adverse impact.'" *Id.* at 1156.[9]

The refusal of the court of appeals in this case to apply Title VII standards to petitioners' request for full retroactive seniority is contrary to this Court's subsequent decision in *Firefighters Local Union No. 1784* v. *Stotts,* 104 S.Ct. 2576 (1984). Certiorari should be granted because of the importance of retroactive seniority to Title VII.

II. Claim Forms in Class Actions: An Intra and Inter-Circuit Conflict

This case also raises an important issue concerning the adequacy of class notice and claims forms under Rule 23(d)(2) and 23(e) of the Federal Rules of Civil Procedure.

In the view of the court of appeals, class members irrevocably waived their right to reinstatement without having been advised that their response to a survey, undertaken to estimate the number of returnees, would constitute a binding election. (App. 14a) The decision of the Seventh Circuit on this issue is in conflict with decisions in other circuits and raises important questions concerning the wording of claim forms and class notices in Title VII cases.

The liability phase of a Title VII class action generally proceeds under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[10] Upon a finding of liability in favor of the class, or

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[9] See, e.g., *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981); *Mosley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d 187, 191 (5th Cir. 1980); *Moore* v. *City of San Jose,* 615 F.2d 1265, 1272 (9th Cir. 1980).

[10] See, e.g., *Robinson* v. *Lorillard,* 444 F.2d 791, 802 (4th Cir. 1971); *Robinson* v. *Union Carbide Corp.,* 544 F.2d 1258 (5th Cir. 1974); *Senter* v. *General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.

(Footnote continued on following page.)

following a compromise on liability issues, notice under Rule 23(d)(2) may be required to identify potential class members.[11] Responses to such class notice are often used to determine mitigation earnings for back pay computations, and, as in this case, may be used to determine the number of discriminatees who seek reinstatement, thereby permitting the district court to undertake the equitable balancing attendant to the grant of retroactive seniority.[12] *Teamsters* v. *United States,* 431 U.S. 324, 376 (1977).

The Third Circuit has held that the wording of Rule 23(d)(2) notice must meet the standards of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), i.e., that notice "must be sufficiently informative and give sufficient opportunity for response, to satisfy due process." *Kyriazi* v. *Western Electric Co.,* 647 F.2d 398, 395 (3d Cir. 1981). As Judge Wisdom stated in *Robinson* v. *Union Carbide Corp.,* 544 F.2d 1258 (5th Cir. 1977), the notice "should set forth the alternatives as well as any other points of law necessary to understand the notice." Id. at 1265 (concurring opinion). These standards are reflected in the notice approved by the Fourth Circuit in *Sledge* v. *J.P. Stevens & Co., Inc.,* 585 F.2d 625, 652-53 (4th Cir. 1978), where the notice specifically admonished class members that a failure to timely respond to a questionnaire would cause their claim to "be forever barred." Id. at 633 n.10.

(Footnote continued from preceding page.)

1975); *Rich* v. *Martin Marietta Corp.,* 542 F.2d 333, 341 (10th Cir. 1975). But see *Holmes* v. *Continental Can Co.,* 706 F.2d 1144, 1154-60 (11th Cir. 1983), concluding that a (b)(2) employment discrimination class action is properly viewed under (b)(3) standards for back pay determinations.

[11] The Rule 23(d)(2) claim form often accompanies the notice of proposed settlement required by Rule 23(e).

[12] See, e.g., *Knight* v. *Board of Education,* 48 F.R.D. 108, 112-14 (E.D.N.Y. 1969); *Bray* v. *Lee,* 337 F.Supp. 934 (D.Ma. 1972).

The decision of the court of appeals in this case is to the contrary. The Rule 23(d)(2) notice in this case (App. 32a-38a) fails to state that any class members who did not opt for reinstatement would irrevocably waive such relief. On the contrary, the class notice is completely silent about the significance of the question on the claim form of "Do you desire reemployment as a TWA hostess?" Nonetheless, the court of appeals held that the notice was sufficient to advise class members that, in order to secure reinstatement, they must "complete the [claim] form in a manner reflecting that desire." (App. 14a.)

The timing of Rule 23(d)(2) claim forms is a second issue presented by this case. In *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), the Fifth Circuit held that class members could not be required to opt into a settlement before a final determination of its propriety had been made. Similarly, in *Romasanta* v. *United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), a different panel of the Seventh Circuit held that, prior to a resolution of seniority issues, a survey of class members was impracticable because "it would be impossible to determine which potential class members 'really' want to return to their positions . . . and which 'really' seek only a financial remedy." Id. at 1147. The decision of the court of appeals in this case is to the contrary.

Certiorari should be granted to resolve the conflict between the circuits about the standards and timing of Rule 23(d)(2) claim forms.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

August, 1984

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1930

NANCY FREEDMAN, et al.,

Plaintiffs-Appellants,

v.

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,

Defendants-Appellees,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

(Caption continued on following page)

Nos. 83-1930, 83-1931, & 83-1932

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs,

and

CAROL HOLMES, et al.,

Plaintiffs-Intervenors-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 & 74 C 2063—Stanley J. Roszkowski, *Judge.*

ARGUED JANUARY 20, 1984—DECIDED MARCH 27, 1984

Before CUMMINGS, *Chief Judge,* CUDAHY, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* The plaintiffs-appellants here are former Trans World Airlines, Inc. ("TWA") stewardesses whose employment was terminated due to TWA's former "no motherhood" policy for female flight attendants. They are appealing from a decision of the district court refusing to amend a consent decree entered pursuant to a settlement agreement which resolved a suit based on the plaintiffs' claim of sex discrimination against TWA. We affirm the order of the district court.

Nos. 83-1930, 83-1931, & 83-1932

I

Procedural Background

In 1970, the Air Line Stewards and Stewardesses Association ("ALSSA"), then the collective bargaining agent of TWA flight attendants, brought a class action suit against TWA alleging that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970).[1] This alleged discrimination consisted of TWA's policy of grounding all female flight cabin attendants who became mothers while permitting their male counterparts who became fathers to continue flying. TWA agreed to end the policy prospectively and the parties reached a tentative settlement which was approved by the district court. This court, however, found that ALSSA was an inadequate class representative because of conflicting interests of the former and current flight attendants, both of whom were represented by ALSSA. We therefore remanded the case to the district court for appointment of new class representatives. *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

Upon remand, TWA amended its answer to assert that the claims of most class members (approximately 92% of the class) were barred because they had failed to file charges with the Equal Employment Opportunity Commission ("EEOC") within the statutory time limit.[2] The district court stated that the Title VII filing requirements

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[1] For a full discussion of the procedural background of this case, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[2] The statute required that an employee file a discrimination claim with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1970). The time limit was extended to 180 days in 1972. 42 U.S.C. § 2000e-5(e) (Supp. II 1972).

were jurisdictional but denied TWA's motion to exclude the affected class members on the ground that TWA's violation continued against all class members until TWA changed its challenged policy. The district court subsequently granted plaintiffs' summary judgment motion on the issue of TWA's liability for violating Title VII. On appeal, this circuit affirmed the grant of summary judgment but held that timely filing of EEOC claims was a jurisdictional prerequisite which TWA could not waive, declined to adopt the continuing violation approach and so found that approximately 92% of the plaintiff class was jurisdictionally barred.[3] *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). This circuit stayed issuance of its mandate while plaintiffs filed petitions for certiorari with the Supreme Court, but the Supreme Court stayed its consideration of the issues pending outcome of settlement proceedings in the district court.

The parties thus entered into a settlement agreement before the Supreme Court considered the merits of the issues. The most relevant provisions of the agreement concern the award of retroactive seniority. All members of the plaintiff class who returned to work were given full company and union competitive seniority. The agreement provided:

> A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company

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[3] Those stewardesses (approximately 30 women) who were terminated on or after March 2, 1970, and those who had previously accepted ground duty positions and so were in a continuing employment relationship with TWA were not considered barred. Approximately 400 other women fell into the class whose claims were considered barred. The first group, whose claims were not barred, was later designated by the district court as Subclass A and the second group as Subclass B.

> seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. . . .
>
> B. It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to . . . all . . . applicable provisions of law, without consent or objection by TWA. . . .

Appellants' Appendix at 6a-7a; 24.

While TWA was barred, under the terms of the Settlement Agreement, from objecting to the district court's determination of the amount of seniority to be awarded, the Independent Federation of Flight Attendants ("IFFA"), which had replaced ALSSA as the collective bargaining agent for the incumbent flight attendants, was permitted to intervene and to object to the settlement terms. The district court, however, rejected IFFA's claim that the court did not have jurisdiction to enter an order regarding the class members whose claims had previously been barred (Subclass B, *supra* n.3) because this circuit had not issued its mandate in the previous appeal with respect to the jurisdictional issue. The district court subsequently approved the Settlement Agreement, found that "full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases," and awarded credit for seniority for the full "compensation period"[4] for the entire plaintiff class. District Court Order Awarding Seniority, entered November 8, 1979, Appellants' Appendix at 30.

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[4] The "compensation period" was defined as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which the Settlement Agreement is signed by TWA. . . ." Appellants' Appendix at 2. TWA signed the agreement on June 18, 1979.

IFFA appealed this decision of the district court on the ground that the court lacked jurisdiction to approve a settlement with respect to Subclass B of the plaintiff class (consisting of those plaintiffs whose claims had been held to be barred because of untimely filing with the EEOC, *supra* n.3). This court, however, held that the district court had jurisdiction to enter an order regarding the settlement, relying on the policy favoring settlement of class action lawsuits, and affirmed the award of seniority. *Airline Stewards and Stewardesses Association v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980).

Upon IFFA's appeal to the Supreme Court, the Court, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), held that the timely filing of a discrimination charge "with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling," *id.* at 393,[5] thus reversing our decision in *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). The district court thus clearly had jurisdiction to award relief to all members of the plaintiff class. The Supreme Court also rejected various other claims of IFFA and dismissed TWA's petition for certiorari on this circuit's affirmance of the summary judgment granted for plaintiffs on the issue of TWA's liability for discrimination.

Following the decision in *Zipes*, the plaintiff class filed several motions in the district court, two of which form

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[5] At the time the district court permitted TWA to amend its answer to assert that the members of Subclass B were barred by failure to file charges timely with the EEOC, the court noted that TWA might have waived its defense of statutory time limitation by its delay in pleading the defense. Thus, while the Supreme Court's holding in *Zipes* does not entirely settle the issue of the validity of the claims of Subclass B members, the district court's observation concerning TWA's possible waiver of this defense indicates that perhaps none of the claims of any class members was barred.

the basis for this current appeal. One of these, the "Motion for Modification of Order Awarding Seniority," filed on August 31, 1982, requested that the court change the amount of competitive seniority awarded to those class members who returned to work. Appellants' Appendix at 37-40. The second motion, "Motion to Enforce Certain Terms of the Settlement Agreement," filed October 5, 1982, requested that the district court permit class members who had originally opted not to return to work to change their minds and seek reinstatement. Appellants' Appendix at 61-68. Both motions were opposed by TWA and by IFFA.[6] In an order dated April 21, 1983, the district court denied both these requests with respect to the consent decree enforcing the Settlement Agreement. Appellants' Brief, Short Appendix at 1-15. Three notices of appeal were filed by various members of the plaintiff class, both individually and on behalf of the class, and the three appeals have now been consolidated.

II

Seniority

Both the Settlement Agreement and the district court order awarding back seniority define the amount of competitive seniority to which each returning class member is entitled in terms of the "compensation period." The "compensation period" is clearly defined in the Settlement Agreement as the period between the date when each member's employment was terminated and the date when TWA signed the Settlement Agreement. This date was June 18, 1979. However, because of the intervention by IFFA, the Settlement Agreement did not become final

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[6] The district court noted that TWA's standing to object to seniority issues was "somewhat unclear" under the terms of the Settlement Agreement. The court did not decide this issue, however, because the arguments raised by TWA and by IFFA are substantially the same. Appellants' Brief, Short Appendix at 11 n.3.

until April 19, 1982, and the stewardesses did not begin to return to work until during the following year—three to four years after the Settlement Agreement was reached.

The plaintiffs-appellants' request for modification of the order entering the Settlement Agreement centers on their contention that they should be awarded competitive seniority for the full period from their original discharge up to the time of reinstatement.[7] Appellants' argument is based on two theses: first, that the change of circumstances occasioned both by the Supreme Court's ruling in *Zipes* and by the delay caused by IFFA's intervention necessitates a modification; second, that the district court had a duty to grant full retroactive seniority because, following the *Zipes* decision, it was required to provide a "make whole" remedy under Title VII.

Appellants are correct in stating that Title VII envisioned a "make whole" remedy designed to ensure total eradication of employment discrimination and that the award of full back seniority is often required in order to accomplish this goal. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762-70 (1976). Appellants are also correct in asserting that a decree entered by a court—whether the result of litigation or of a settlement agreement—is subject to subsequent modification in the proper circumstances even if the power to modify has not been specifically reserved in the decree. *United States v. Swift & Co.*, 286 U.S. 106 (1932).[8]

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[7] Competitive seniority is of great significance to flight attendants because it determines the hierarchy among employees for purposes of domicile choice, bidding for flight assignments, schedule (or line) holder status and protection against furlough and displacement. For a fuller discussion, *see Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1144-45 (7th Cir. 1983).

[8] Appellees TWA and IFFA argue that the Settlement Agreement is merely a contract governed by principles of local law generally applicable to contracts. *Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO v. Trans*

(Footnote continued on following page)

In *Swift*, the Supreme Court articulated the standard to be applied in determining when modification of a judicial decree is permitted. There, the defendants, who had entered into a consent decree following antitrust proceedings brought by the United States, subsequently sought modification of that decree. The Court stated:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119. An example of an unforeseen change of conditions necessitating modification of a decree is provided in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), in which the Supreme Court held that a consent decree prohibiting a railroad and certain unions from discriminating against nonunion employees should be modified after the Railway Labor Act was amended. *See also Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 971-73 (1st Cir. 1982) (massive layoffs of recently hired police and firefighters with large proportion of minorities

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[8] *continued*

World Airlines, Inc., 713 F.2d 319, 321 (7th Cir. 1983). The equitable remedies of reformation and rescission are usually available only when mistake, misrepresentation, duress and undue influence are present, but these remedies may also be available in cases of extreme and unforeseeable change of circumstances. RESTATEMENT (SECOND) OF CONTRACTS, chs. 6, 7 and 11, §§ 151-77 and 261-72 (1981). We do not need to make a definitive determination whether the order enforcing the Settlement Agreement should be characterized as a contract or as a judicial decree because, in the absence of mistake, misrepresentation, duress and undue influence (which appellants do not allege), the standards for modification are essentially the same in both circumstances.

caused by unforeseeable enactment of severe budget restrictions necessitated modification of consent decree), *vacated for consideration of mootness*, 103 S. Ct. 2076 (1983). *Cf. Fox v. United States Department of Housing and Urban Development*, 680 F.2d 315, 322-24 (3d Cir. 1982) (frustration of plaintiffs' expectations by changes in mortgage market not sufficiently extraordinary to require change in consent decree).[9]

Appellants must therefore demonstrate that the changes in circumstances, which they argue justify a modification of the court's order, were both unforeseeable and extraordinary and imposed a significantly heavier burden on them. The changes in circumstances, however, were not unforeseeable. Although the Settlement Agreement prohibited TWA from contesting the terms of the court order, IFFA was not mentioned in this prohibition. That IFFA might object would have been predictable both because the agreement was patently adverse to the interests of current employees represented by IFFA and because this circuit's prior decision that incumbent and former employees should be separately represented clear-

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[9] Appellants also cite *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), for the proposition that, if the original decree does not prove adequate to remedy the harm as intended, then the district court has the power to modify the decree subsequently in order to accomplish its purpose. *Id.* at 248-52. We, of course, do not disagree with the assertion that the district court has such authority. However, we do not agree that the district court has committed error by declining to exercise its authority in this case. The grant of additional back seniority to the appellants will primarily harm the incumbent employees. TWA is thus primarily a neutral bystander at this point in the litigation. It is therefore unclear how the award of additional seniority, under these particular circumstances, is necessary to further the goal of righting the wrong for which TWA was presumably responsible. In addition, the disadvantage to the appellants is not sufficiently egregious to require modification of the decree.

ly indicated the inimical interests of the two groups. Further, some delay between TWA's signing of the agreement and the reinstatement of former employees was anticipated, even though the delay may have been longer than expected. Thus, although the greater delay imposed a heavier burden (by delaying the time of reinstatement and thus the accumulation of additional seniority), this burden cannot be said to be excessively harsh or to frustrate the entire purpose of the settlement.

Finally, the Supreme Court's decision in *Zipes* did not represent an unforeseeable change of law comparable to the legislative enactments of *System Federation* and *Boston Chapter, NAACP.* The chances of the outcome of litigation before the Supreme Court represented precisely the calculated risks which both parties took in deciding to terminate the suit through settlement. That one party in hindsight would have been better off in pursuing its remedies through litigation does not now justify a modification of the terms of that settlement. Such a modification at this juncture and under these circumstances would also significantly undermine the judicial policy of encouraging settlements. As this court stated in proceedings approving another settlement entered into earlier in this course of litigation, when the EEOC attempted to intervene arguing that the settling plaintiffs would have received greater relief by litigating, ". . . the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation.'" *Air Lines Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968)). Because the change of circumstance was neither unforeseeable nor so exceptional as to satisfy the standard for modification of a decree, we therefore affirm the district court's refusal to award additional back seniority to the appellants.

III

Change of Mind

Appellants also requested that the district court permit certain former employees who, at the time of the settlement in 1979, indicated that they did not wish to return to work to change their minds now and seek reinstatement. Class members who wished to return to work were required to file a claim form by December 2, 1979, which included questions concerning their former employment by TWA. In addition, in a question *not* specified in the Settlement Agreement as being required to be included on the claim form, the former stewardesses were asked whether they sought re-employment with TWA. The district court interpreted a failure to respond affirmatively to this question as a binding decision not to seek re-employment "because a prerequisite to eligibility is the *timely* filing of a reemployment application." Appellants' Brief, Short Appendix at 8 (Order of April 21, 1983) (emphasis in original).

Appellants argue that the Settlement Agreement in fact only required all stewardesses who opted for re-employment to complete the claim form. Virtually all class members did complete the claim form, regardless of their indicated decision as to whether to seek re-employment, because the claim form was also the means by which those who did not wish re-employment could obtain alternative benefits from TWA. Appellants, in turn, rely on another provision in the Settlement Agreement which states:

> TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period [after the Final Order Date] if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such reemployment during such one (1) year period.

Appellants' Appendix at 8.

The construction of a consent decree should be treated like that of a contract, and the purpose of the court in construing such a decree should be to discern the intent of the parties in entering into such an agreement. *Sportmart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313, 316-17 (7th Cir. 1979). *See also United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *White v. Roughton*, 689 F.2d 118, 119-20 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1524 (1983). In order to accomplish this, the construing court may look not only to the decree itself but to the circumstances surrounding the negotiation and formation of the Settlement Agreement. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

Appellants' reliance on the passage of the Settlement Agreement quoted above appears misplaced because the passage seems intended to impose an additional requirement on a returning employee to accept re-employment within a year after the final order date. Such re-employment would only come after the prospective returnee has satisfactorily completed TWA's retraining course. It would not make sense within the framework of the agreement for an employee wishing to return to wait until the end (or almost the end) of that period to signify her desire to return because TWA's obligation to offer retraining courses expires at the end of that year. In addition, this passage taken as a whole imposes a series of additional prerequisites including willingness to undertake retraining and successful completion of the retraining course, all of which must logically come after the employee had indicated her desire to return to work.

The Settlement Agreement, however, does not state explicitly anywhere that there is a time limit on or before which a class member must indicate her desire to be re-employed, although completion of the claim form by December 2, 1979, was a clear prerequisite. Nonetheless, by examing the terms of the agreement more fully we conclude that the agreement, by repeatedly referring to the claim form as a "re-employment application," did con-

template that all class members desiring reinstatement would be required to complete the form in a manner reflecting that desire. To contend that a class member must complete the form in order to obtain her rights but to say then that the manner in which the form is completed is irrelevant or waivable would seem to undermine the framework for obtaining remedies established in the agreement.

Finally, we also note that the number of employees seeking reinstatement as determined from these 1979 claim forms was relied on by both the district court and this court in determining that the award of back seniority would not have an unusual adverse impact on the incumbent flight attendants. *Airline Steward and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980). Appellants now assert that the number of employees who now wish to change their minds in order to return is smaller than the number who now no longer desire re-employment but had indicated in 1979 that they would seek re-employment. There is therefore a net "loss" of returnees, although appellees contend that this conclusion is incorrect because additional class members have been identified since 1979, thereby increasing the number of returnees. In any event, the significance of these representations by the plaintiff-class attorneys to the district court and to this court lies in these courts' reliance on the figures derived from the claim forms. The only seemingly logical construction to be given to the courts' and to the parties' own interpretation of the Settlement Agreement is that the claim forms were intended to double as re-employment applications. Further, the filing of such a form clearly indicating a decision against reinstatement would be binding on those class members who chose that option.

Appellants argue, in the alternative, that even if the agreement did require class members to indicate their intention to seek reinstatement by December 2, 1979, these provisions should now be modified because of changed circumstances. For the reasons previously stated in Part

Nos. 83-1930, 83-1931, & 83-1932

II, we must also reject this contention. The order of the district court is therefore affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 27, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

No. 83-1930

NANCY FREEDMAN, et al.,
Plaintiffs-Appellants,

vs.

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,
Defendants-Appellees
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,
Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 70 C 2071, 74 C 2063

Stanley J. Roszkowski
Judge

(Caption continued on following page)

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,
Plaintiffs,

AND

CAROL HOLMES, et al.,
Plaintiffs-Intervenors-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 70 C 2071, 74 C 2063

Stanley J. Roszkowski
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 9, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

NANCY FREEDMAN, et al.,

Plaintiffs-Appellants,

No. 83-1930 *vs.*

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL, 550, TWU, AFL-CIO & TRANS WORLD AIRLINES, INC.,

Defendants-Appellees,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

No. 83-1931

MARY ELLEN GILES, et al.,

Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

(Caption continued on next page)

No. 83-1932

AIR LINE STEWARDS & STEWARDESSES ASSOC., LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs,

and

CAROL HOLMES, et al.,

Plaintiffs-Intervenors-Appellants,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 & 74 C 2063—**Stanley J. Roszkowski,** *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by attorney for appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,
Plaintiffs,
vs.
TRANS WORLD AIRLINES, INC.,
Defendant.
No. 70 C 2071

ANNE B. ZIPES, et al.,
Plaintiffs,
vs.
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,
Defendants.
No. 74 C 2063

[Filed April 23, 1983]

ORDER

Before the court are various pending motions. The court will address each in turn.

IFFA's MOTION TO COMPEL

IFFA moves to compel plaintiffs to answer IFFA's second set of interrogatories. The interrogatories ask counsel for plaintiffs to specifically delineate the amount of time spent on the related *American Airlines* case, as well as the amounts and sources of compensation received for that work.

IFFA contends the reasonableness of the time spent and the fees sought by plaintiffs in this action can be judged in part by: 1) comparing them to the fees charged in the *American Airlines* case and 2) evaluating the reasonableness of the time spent in light of the hours already expended on parallel or sometimes identical legal issues.

The plaintiffs object to the interrogatories as irrelevant and burdensome. Plaintiffs argue that the fees sought against the Union relate to work which first began in 1979, one year after the fee award in *American Airlines.*

Because the information sought would be only marginally, relevant if at all, and would be very burdensome for the plaintiffs to produce, the court denies the motion to compel.

MOTION FOR DECLARATORY RELIEF

The plaintiffs have moved for a declaration that Bernadette Brockman Scott Montemurro ("Montemurro") and Elizabeth Pehanic Ahlers ("Ahlers") are to be afforded reemployment and adjusted seniority benefits. For the reason stated herein, the motion is granted.

In December of 1979, the plaintiff class filed a "Motion to Determine Class Membership." In that motion, the plaintiff class submitted to the court a list of person who comprised all of the potential class members known to them at the time. Included on the list were Montemurro and Ahlers.[1]

In response to the motion, the court set January 16, 1980 as the cut-off date "to file objections, if any, to plaintiff's motion to determine class membership." *See* Minute Order 12/19/79.[2]

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[1] Montemurro and Ahlers also filed timely claim forms.

[2] The original December 19, 1979 minute order contained a typographical error. The order set January 14, 1979 as the cut-off date. A later minute order corrected the date, changing the 14th to the 16th and changing 1979 to 1980.

The cut-off date was then extended to March 12, 1980. Within the time period set, TWA challenged certain individuals' rights to class membership. *(See e.g.* Judith Jacobson, Transcript of Hearing before Judge McGarr on February 11, 1980, at p. 51-52). TWA also challenged the right of certain class members to be re-employed. *(See e.g.* Laura Shine, *Id.* at 52). During these proceedings, TWA never objected to Montemurro's or Ahler's re-employment rights.

On July 27, 1982, TWA informed class counsel that Montemurro and Ahlers were not entitled to re-employment because they had been terminated for cause. The documents allegedly supporting termination for cause were in TWA's possession as far back as 1973 and 1974.

The plaintiff class claims that TWA has waived their right to raise these objections by failing to raise them within the time period set.

TWA, in response, claims that the January 16, 1980 deadline applied only to objections to class membership and was not related to TWA's right to challenge admitted class members' rights to re-employment. TWA points to Section VI of the Settlement Agreement, which provides that re-employment will not be available to those class members who were terminated for cause:

> . . . no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 and who has been terminated for cause or who has resigned under circumstances which do not entitle her to be re-employed.

TWA argues that Ahlers resigned for medical reasons and Montemurro resigned for personal reasons.

The intent of the court and the parties was that all objections to class membership *and re-employment* be raised by January 16, 1980. TWA's own conduct demonstrates this. Within the cut-off period, TWA raised objections both to class membership generally and to class members' rights to re-

employment (*e.g.* Laura Shine). Furthermore, even if the deadline were construed in accordance with TWA's wishes, equitable considerations such as laches would also bar objections. TWA had the relevant information as early as 1973-74.

For these reasons the court finds that TWA has waived its objections to Montemurro and Ahlers. Montemurro and Ahlers are therefore entitled to re-employment and adjusted seniority benefits.

MOTION TO ENFORCE CERTAIN TERMS OF THE SETTLEMENT AGREEMENT

Plaintiff's motion requests the court to order TWA to re-employ certain class members who three years ago indicated in writing their preference for trip-passes rather than re-employment. TWA and the IFFA oppose the motion and argue that the individuals choosing trip passes made a binding election, thereby losing any right to re-employment. Because the court finds that the election made in 1979 is binding, the plaintiffs' motion is denied.

TWA's duty to re-employ class members is outlined in Section III-A of the Agreement:

> TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment.

Section VI states that TWA will provide retraining classes to facilitate re-employment. The last class was to commence before the expiration of one year "following the Final Order Date." That is, one year after April 19, 1982 or April 19, 1983. The next sentence states that TWA will have no obligation to retrain or re-employ a class member after the end of that period if the class member has not qualified for retraining "or has elected not to accept such re-employment during such one-year period."

Plaintiffs contend that this language obligates TWA to re-employ all those who elect to accept re-employment during the one year period. The other, more specific provisions of Section VI which are also applicable, however, suggest otherwise.

Section VI of the Settlement Agreement is entitled "Eligibility for Re-employment." It states that

> A class member shall be eligible for re-employment if she fulfills TWA's physical requirements (reasonably applied), medical examination, completion of retraining, *and timely files the following described Re-Employment Application.*

(Emphasis supplied).

The description of the Re-Employment Application follows in the next paragraph, indicating among other requirements that those desiring re-employment so indicate in writing on the Re-Application Form. The full paragraph provides:

> Each class member who desired re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:
>
> A. Current full name, name as of termination, social security number, and former TWA employee number.
>
> B. Home address and mailing address, including zip code.
>
> C. The last TWA base at which she was employed.
>
> D. Approximate date on which she was last employed by TWA.
>
> E. Preferences concerning location of new home base.
>
> F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.
>
> G. Financial information necessary for the calculation described in Section IV.

Pursuant to this provision, plaintiffs' counsel prepared and mailed to class members a document entitled "Claim Form For

Re-Employment." The form specifically askes "Do you desire re-employment as a TWA hostess?" Next to the questions are boxes to be checked Yes or No.

The Agreement, in one of the closing paragraphs of Section VI, sets a time period for the submission of the application form.

> No class member shall be entitled to re-employment under this agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencment of the hearing in Section X.

The hearing described in Section X was the hearing on settlement approval, which commenced on October 3, 1979. Consequently, under the terms of the Agreement, the Re-employment Application was required to be filed by December 2, 1979.

Instead of indicating in writing a preference for re-employment, the class members who now seek re-employment checked the "no" box. This meant that the class members would be entitled to 12 TWA Trip passes per Section VII of the Agreement.

The plain and specific terms of the Agreement require class members to indicate in writing their preference for re-employment prior to December 2, 1979. Failure to do so renders the class member ineligible for re-employment because a prerequisite to eligibility is the *timely* filing of the re-employment application. Having elected trip passes and having failed to express a desire for re-employment within the sixty day period of Section VI, these class members now have no right to re-employment. Their election became binding on December 2, 1979. For this reason, the motion is denied.

MOTION TO ADD CLASS MEMBERS AND TO AFFORD BENEFITS TO RECENTLY LOCATED CLASS MEMBERS

Plaintiffs bring this motion on behalf of seventeen women who claim to be class members. In the course of reviewing and briefing the motion, the parties have been able to agree on the majority of questions posed by the motion.

The parties agree that 10 of the 17 women are entitled to class membership. In accordance with the parties' stipulation, the court declares that the following ten claimants are hereby included on the class list and shall receive all of the rights and benefits due class members under the Settlement Agreement:

Linda G. Platt
Zella M. Ochs
Lois Kay Heany
Judith Graggero
Carol Elliott
Renee M. Cigich
Bette M. Williams
Karen Rose Davis
Jeanette Owens
Margaret Bryans

The parties also agree that three of the seventeen women, Marsha Seifer Kelly, Joyce Doyle and Susan G. Dancer, need to submit additional materials before the court may consider their individual cases. The court therefore requires these three potential class members: (1) to submit an affidavit stating whether or not they received a letter from TWA notifying them of the change in the "no motherhood" policy and (2) if they received such a letter and failed to act, to offer an explanation.

The plaintiffs have also agreed to withdraw, without prejudice, the name of Ingrid Langner Abraham pending further investigation of the circumstances surrounding her case.

The three remaining individuals, Lois P. Underwood, Joyce A. Duchon, and Joanna Mueller, are the subject of dispute. TWA contends it needs additional time to investigate the claims of Underwood and Mueller. TWA also contests Duchon's claim to class membership, arguing that a ninety day personal leave of absence taken on April 30, 1969 has the effect of placing Ms. Duchon outside of the class.

As to these last three individuals, the court will hear short oral arguments on May 11, 1983 at 9:00 a.m. TWA will have investigated the facts concerning Mueller and Underwood by this time. The oral argument will also afford TWA an opportunity to more fully explain its position on Ms. Duchon. And assuming that additional affidavits have been submitted by Ms. Kelly, Ms. Doyle and Ms. Dancer, their cases will also be taken up at the hearing.

INTERVENOR'S CROSS APPLICATION FOR INJUNCTIVE RELIEF

The court stays its consideration of this motion until the Seventh Circuit rules on the pending appeal concerning whether TWA must re-employ class members within a fixed period of time.

PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AWARDING SENIORITY

On November 8, 1979, the court awarded retroactive union seniority to each class member who was then employed by TWA as a flight attendant or who thereafter became rehired by TWA under the Settlement Agreement. The seniority awarded included credit for competitive seniority up to June 18, 1979.

In the order awarding seniority, the court found that "*full restoration* of retroactive seniority will not have an unusual

adverse impact upon currently employed flight attendants." The order provided that each class member

> . . . shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, *plus credit for such seniority for the "compensation period," as defined in the Settlement Agreement.*

Order Awarding Seniority, November 8, 1979 (emphasis supplied).

Since the order was entered, three years of appeals have intervened.

The plaintiffs now ask the court to provide each class member an additional amount of seniority from November 8, 1979 forward to the time the class member is actually rehired by TWA. The plaintiffs argue that this additional award is consistent with the courts intent to award "full restoration of retroactive seniority, *Id.*, and further is consistent with the "make whole" objective of Title VII.

The Union and TWA[3] argue that entry of such an award would be inconsistent with the specific terms of the Settlement Agreement. After examining the terms of the agreement, the court denies the plaintiffs' motion.

Both the Settlement Agreement and the order awarding seniority tie the amount of seniority to be awarded to the "compensation period." Section V of the Settlement Agreement states:

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[3] TWA's standing to object to seniority issues is somewhat unclear given the amendment to the Settlement Agreement which provides that the court will determine seniority issues "without contest or objection by TWA." The court need not decide this issue, however, because the Union, which definitely has standing and has objected to the motion, raises arguments similar to those made by TWA. To the extent TWA is held to be barred from raising seniority objections, the court will view the objection as the Union's alone.

> Each re-remployed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated *plus company seniority and such length of service for the entire compensation period.*

The court's November 8, 1979 Seniority Award also employed similar language.

The Settlement Agreement defines "compensation period" as

> . . . the period of time which commenced upon the termination of a class member's employment *and ends on the date on which this Settlement Agreement is signed by TWA.*

TWA signed the Agreement on June 18, 1979.

Thus, the compensation period ended on that date of signing and the court's original award of seniority up to June 18, 1979 was in accordance with these settlement term provisions.

Given the specific terms which limit seniority to the compensation period, the award plaintiffs request is simply beyond the terms of the Settlement Agreement.

In response to the precise terms of the Agreement, plaintiffs tacitly admit that the Agreement does not allow the award they now seek. Plaintiffs, in their reply brief, argue that the "[c]court's authority to award seniority arose out of the Civil Rights Act, not the Settlement Agreement." Plaintiff's Reply Memorandum at 1.

The plaintiff's, however, lose sight of the fact that this litigation was comprised through the Settlement Agreement and there has been no finding that TWA has violated the Civil Rights Act. The Settlement Agreement provides that "the execution of this Agreement by TWA is not and shall not be construed as an admission [of] liability." (Section II of the Settlement Agreement). In addition, the Agreement, signed by plaintiffs, recognizes that "TWA will have no monetary or other

obligation to any member of the class or to any representative or attorney of the class unless expressly provided in this Agreement." In light of this language, the court may not and will not fashion additional relief beyond the seniority provided for in the Settlement Agreement. The motion is therefore denied.

MOTION FOR RELIEF REGARDING COMPANY SENIORITY OF CERTAIN PRESENTLY EMPLOYED CLASS MEMBERS

Section III(c) of the Settlement Agreement provides that class members who are already employed at TWA "shall have, be credited with and enjoy the amount of seniority" provided for in the Agreement. TWA credited presently employed class members with the seniority in July of 1982.

The plaintiffs contend that the seniority should have been credited to them approximately two months earlier, on April 19, 1982,[4] the date the Settlement Agreement became final. They contend the failure to properly credit seniority resulted in reduced wages for a period of approximately two months.

TWA contends that a July adjustment date was reasonable under the circumstances and that if the plaintiffs desired

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[4] TWA's argument that the Final Order Date should be viewed as June 1, 1982 is unpersuasive. The Seventh Circuit order dated June 1, 1982 provided:

> Now that the Supreme Court has affirmed our judgment affirming the district court's approval of the settlement, award of seniority, and dismissal of the action, our mandate in Nos. 79-2460 and 79-2465 will issue as of course, and any appropriate proceedings in the district court in implementation and enforcement of the settlement will follow by reason of such affirmance.

The Seventh Circuit's order is merely a directive to this court to conduct any further necessary proceedings. The final order date, upon which the parties became bound, is clearly April 19, 1982, the day the U. S. Supreme Court mandate issued.

seniority adjustments to be retroactively applied to the final order date, they should have negotiated for appropriate language in the Settlement Agreement. TWA also argues that the adjustments requested should be considered *de minimus.*

First, the adjustments requested are not *de minimus.* Although the amount of salary adjustment has not been established and may indeed be small, the adjustment is significant to the class members. Proper and timely credit for seniority is a right class members bargained for and which this court will enforce.

Second, the absence of a provision specifying the date for seniority adjustments means the seniority provisions were to take effect at the same time as the obligations under the additional agreement, i.e., at the final order date. Where the parties desired time beyond the final order date, they provided for it in the Agreement. For example, the time in which TWA must offer retraining classes was set at one year. Since the terms of the Agreement specify additional time in the specific instances where it was deemed necessary, it must be implied that all other obligations begin at the time the settlement became final.

The court therefore grants plaintiffs' motion and instructs TWA to retroactively adjust the presently employed class members' salaries for any wages lost due to the failure to properly credit seniority.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski, *Judge*
United States District Court

Dated: April 21, 1983

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER, *Plaintiffs,* v. TRANS WORLD AIRLINES, INC. *Defendant.*	No. 70 C 2071
ANNE B. ZIPES, FRANCES M. SWIFT, et al. *Plaintiffs,* v. AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC., *Defendants.*	No. 74 C 2063

NOTICE TO CLASS MEMBERS

Pursuant to an Order of the Court, this Notice is being distributed to all persons who have previously been included as class members in these cases.

The purpose of this Notice is to advise you: (1) the provisions of a settlement agreement, (2) of your rights under the settlement agreement, and (3) of a court hearing on the agreement to be held on July 31, 1979, at 10:30 A.M.

HISTORY OF THE LITIGATION

On July 2, 1965, the Civil Rights Act of 1964 (the "Act") went into effect, prohibiting employment discrimination on the basis of sex. On August 18, 1970, a suit was filed alleging that Trans World Airlines, Inc. ("TWA") had violated the Act. The suit was brought on behalf of all hostesses who were fired (or resigned) on account of pregnancy or the adoption of a child. In 1971, a settlement agreement was entered into which was approved by the District Court but that approval was reversed on appeal to the Seventh Circuit Court of Appeals. The Court of Appeals also ordered that the union (Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) be removed as the representative of the class. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636, (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). When the case resumed in the District Court, Pamela Dailing, Pat Santini and Anne B. Zipes were appointed as the representatives of the class.

In 1972, TWA offered re-employment as hostesses, without retroactive seniority or back pay, to those class members who agreed to waive their rights in this litigation. In 1974, another suit was filed which alleged that TWA's 1972 offer was a violation of the Act.

On October 15, 1976 and October 18, 1976, respectively, two Court Orders were entered which: (a) declared that TWA's aforesaid employment practice had been a violation of the Act and (b) ruled that the class included all hostesses who had been fired after July 2, 1965 on account of motherhood.

TWA appealed to the Seventh Circuit Court of Appeals. In August 1978, the Court of Appeals ruled that the aforesaid employment practice was a violation of the Act but that the only persons who are entitled to membership in the class are those hostesses who either (a) gave birth to children on or after March 2, 1970 or (b) gave birth to children prior to March 2,

1970 and thereafter held ground jobs continuously until March 2, 1970. (582 F.2d 1142). That decision of the Court of Appeals was appealed to the United States Supreme Court by the plaintiffs and TWA by petitions for writs of certiorari. Prior to any decision by the U.S. Supreme Court, this settlement agreement was entered into. The agreement has been signed by TWA, Pamela Dailing, Pat Santini and Anne B. Zipes. It was presented to the District Court on June 26, 1979 at which time it was preliminarily approved by the Court. For purposes of this proposed settlement, the Court divided the class into two sub-classes, *viz.*:

SUB-CLASS A

> All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) on or after March 2, 1970 or whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were employed thereafter in ground jobs continuously until March 2, 1970;

SUB-CLASS B

> All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were not thereafter employed in ground jobs continuously until March 2, 1970.

Separate attorneys have been appointed to represent the interests of the aforesaid two sub-classes. The attorney for Sub-Class A is Kevin M. Forde, 111 W. Washington Street, Chicago, Illinois, who was appointed by the Court in June 1979 to provide separate representation for Sub-Class A, including the evaluation of the fairness of the settlement to Sub-Class A.

The attorneys for Sub-Class B are Arnold I. Shure, 10 South LaSalle Street, Chicago, Illinois and Pressman & Hartunian, Chtd., 55 East Monroe Street, Chicago, Illinois. Prior to the appointment of Mr. Forde, Mr. Shure and his associates and Pressman & Hartunian represented all of the class members. DO NOT MAKE INQUIRIES BY TELEPHONE TO THE AFORESAID ATTORNEYS OR TO THE COURT; YOU MAY DO SO ONLY IN WRITING.

A hearing will take place on July 31, 1979 at the hour of 10:30 A.M. at the U.S. District Courthouse, 219 South Dearborn Street, Chicago, Illinois in the courtroom of Judge Stanley J. Roszkowski, to determine whether or not the settlement agreement should be finally approved.

THE SETTLEMENT AGREEMENT

The Settlement Agreement is available for inspection by any interested person. It is on file at the office of the Clerk of the U.S. District Court, 219 South Dearborn Street, Chicago, Illinois. The provisions of the settlement agreement are summarized as follows:

RE-EMPLOYMENT OR TRIP PASSES

All members of both sub-classes will be entitled to re-employment as TWA hostesses or, if you so desire, you may receive twelve (12) trip passes instead, the details of which are stated below.

In order to be eligible for re-employment as a hostess, the following requirements must be met by you:

(1) Complete the enclosed Claim Form;

(2) Successfully pass TWA's medical examination;

(3) Successfully meet TWA's physical requirements;

(4) Complete TWA's re-training course.

If you apply for re-employment, you will be notified by TWA of the date and place of the re-training class to which you will be assigned. The re-training classes will be conducted at various times within one year following final approval of the settlement. Base assignment will be made according to seniority. If no vacancy exists at a base of your choice, TWA will assign a base to you.

SENIORITY

Each re-employed class member will be credited with the seniority which accrued as of the time when she was terminated plus retroactive seniority (to the extent allowed by the Court) for such of the time subsequent to termination as the Court allows. The plaintiffs intend to seek full retroactive seniority for the entire period up to June 18, 1979.

Any class member who does not become re-employed as a hostess will receive twelve (12) trip passes, each of which shall be at any time during her lifetime good for a TWA round trip by her, her spouse, or any of her dependent children under 21 and her children under 23 who are full-time students. The passes will be Class 9 (which is the priority for retired hostesses) except that other persons holding Class 9 passes shall have priority.

BACKPAY

TWA will pay $1,500,000 to Sub-Class A (the post-March 1970 group), to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 30 persons in this sub-class.

TWA will pay an additional $1,500,000 to sub-class B (the pre-March 1970 group) to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 400 persons in this sub-class.

The prorations will be based on losses and earnings after adjustment for periods of disability and actual earnings since termination. Deductions will be made for Social Security, income tax withholding, and plaintiffs' attorneys' fees and expenses.

Attorneys' fees and expenses will not be determined unless and until the agreement is first approved. The plaintiffs' attorneys intend to seek an award of fees, from the total settlement funds of $3,000,000, in the total amount of up to $1,250,000 plus expenses, to be divided equally between the two Sub-Classes. Their petitions for attorneys' fees will set forth their efforts during seven years of litigation, consisting of in excess of 4,000 hours of lawyer time expended on behalf of all class members. Mr. Forde will file a separate petition for services rendered to Sub-Class A subsequent to June 20, 1979. If the settlement is approved, the Court will make its decision on fees based upon fairness and the applicable standards of law.

The re-employment rights and trip-pass benefits are the same for both sub-classes. The individual members of Sub-Class A will receive much larger amounts than the individual members of Sub-Class B. The decision of the Plaintiffs' attorneys to accept the offer which gives rise to this disparity was due to the Court of Appeals' opinion, which held that the members of Sub-Class A are entitled to relief but that the claims of the members of Sub-Class B are barred on account of no one of them having filed a timely claim with the federal Equal Employment Opportunity Commission.

OBJECTIONS AND COMMENTS

If the settlement is finally approved, both lawsuits will be dismissed. You may appear and be heard, in person or by an attorney, at the hearing on July 31, 1979. You may also file in writing a statement of your objections or comments. This may be done by mail, addressed to:

Clerk of the U.S. District Court
Re: Airlines Stewardess
Litigation, Case No. 70 C 2071
219 South Dearborn Street
Chicago, Illinois 60604

The objection or comment must arrive at the Clerk's office by no later than July 27, 1979.

RETURN OF CLAIM FORMS

IN ORDER TO RECEIVE ANY OF THE BENEFITS OF THE SETTLEMENT, REGARDLESS OF WHETHER OR NOT YOU OBJECT OR HAVE ANY COMMENT, YOU MUST RETURN THE ENCLOSED CLAIM FORM, SIGNED BY YOU AND *NOTARIZED,* MAILED OR DELIVERED TO:

PRESSMAN & HARTUNIAN, CHTD.
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603

The claim forms must be received by Pressman & Hartunian, Chtd. by no later than August 31, 1979.

Clerk of the U.S. District Court
for the Northern District of Illinois,
Eastern Division